FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 27 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO FILE TARDY AMICUS CURIAE BRIEF FOR THE STATE OF CALIFORNIA

AND

Brief of the State of California as Amicus Curiae

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The State of California moves this Court for leave to file tardy *amicus curiae* brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF CALIFORNIA

Like the State of Maryland, the State of California recently enacted a statute relating to price discrimination in the sale of motor vehicle fuels and oils.[1] (California Bus. & Prof. Code §§ 21200-21203, which is reproduced in Appendix A to the *Amicus Curiae* Brief.) The California statute prohibits price discrimination in the sale of motor vehicle fuels and oils in language virtually identical to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). (Cal. Bus. & Prof. Code § 21200.) Unlike the Maryland statute, the California statute contains a "meeting competition" defense, under which an oil company may discriminate in price if the lower price was made in good faith to meet an equally low price of a competitor ". . . and was also offered to any other of his purchasers in competition with" the favored purchaser. (Cal. Bus. & Prof. Code § 21200.) Thus, the California statute allows the meeting of competition on a "competitive area" basis instead of on a state-wide basis as required by the Maryland statute.

The United States District Court for the Northern District of California, the Honorable Lloyd H. Burke presiding, struck down the California statute in June 1976 as in irreconcilable conflict with the Robinson-Patman Act, 15 U.S.C. § 13, in a suit brought by Shell Oil Company (one of the appellants in the instant case) and joined as

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1. The California statute, unlike the Maryland statute, covers only price discrimination, and does not, for example, prohibit company-operated stations. This *Amicus Curiae* Brief is limited to the Supremacy Clause issues arising from state price discrimination statutes.

amicus curiae by three other oil companies (one of which, Exxon Corporation, is an appellant in the instant case). *Shell Oil Company v. Evelle J. Younger (Attorney General of the State of California)* No. C-75-2691 LHB (N.D. Cal.) Order of June 11, 1976. A copy of this decision is reproduced as Appendix B to the *Amicus Curiae* Brief. The decision is also reported at 1976 CCH Trade Cases ¶ 60,960.

On appeal, the United States Court of Appeals for the Ninth Circuit granted an expedited hearing and took the appeal under submission on June 8, 1977. In an order filed December 27, 1977 and received by the California Attorney General's office on December 30, 1977, the Ninth Circuit, *sua sponte*, vacated submission of the appeal "pending a decision by the Supreme Court of the United States in *Exxon Corp. v. Maryland, review granted* 46 U.S.L.W. 3184 (October 3, 1977)." A copy of the Order is attached as Appendix C to the *Amicus Curiae* Brief. Upon receipt of the Ninth Circuit order, the California Attorney General's office requested copies of the briefs in the instant case from the Maryland Attorney General's office. Copies of the briefs were received on January 16, 1978. The instant motion for leave to file a tardy *amicus curiae* brief was made as soon as possible.

Thus, California seeks to file an *amicus curiae* brief because the decision in the instant matter will substantially affect the disposition of a related case concerning the constitutionality of a California statute on the same subject as the Maryland statute. It is extremely important that California be able to express its views on the preemption issue because this Court's decision will probably establish guidelines for federal courts, such as the Ninth Circuit in particular, to follow in deciding whether a state statute is preempted by the Robinson-Patman Act. Without hearing California's views, this Court might inadvertently announce

a rule dispositive of the California case, which involves a different statute on the same subject as Maryland's. In addition, California seeks to file an *amicus curiae* brief concerning questions of law not adequately covered by the parties.

RELEVANT QUESTIONS OF LAW NOT ADEQUATELY COVERED BY THE PARTIES

California wishes to present for this Court's consideration a point of view not presented by the parties but incorporated into the California statute: the meeting of competition on a "competitive area" basis. The "competitive area" approach—an approach in between the oil company's "spot pricing" approach and Maryland's state-wide pricing approach—insures the supplier substantial price flexibility by allowing the oil companies to meet local competition on a "competitive area" basis without injurious and unfair price discrimination between competing dealers. In so doing, the California "competitive area" approach preserves the benefits of competition which the parties herein each contend the opponent's approach destroys.

An issue preliminary to the preemption issue but not adequately covered by the parties is the scope of the meeting competition defense of Section 2(b) of the Robinson-Patman Act. The oil company appellants urge the 2(b) defense should be "tailored to an individual situation." (Appellants' Brief of Exxon Corp., Phillips Petroleum Co., Shell Oil Co. and Gulf Oil Corp. [hereinafter Exxon *et al.* Br.] at 58.) This interpretation would allow the oil companies to use Section 2(b) as a "sword" to create the very injurious price discrimination sought to be eliminated by Section 2(a) of the Robinson-Patman Act. California submits the Section 2(b) defense is properly construed as requiring the meeting of competition in the oil industry on a "competitive area" basis. The legislative history of

Section 2(b) clearly demonstrates that Congress did not intend to allow a seller to meet competition in an *unnecessarily discriminatory* fashion. *See* 80 Cong. Rec. 9418 (1936), quoted in *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 754 fn. 2 (1945), as dispositive of Congressional intent in enacting Section 2(b). The California interpretation also avoids the (unnecessarily) anticompetitive consequences of the meeting of competition in the oil industry on a "spot" basis, as recognized by this Court in *FTC v. Sun Oil Co.*, 371 U.S. 505, 523 (1963).

The adoption of the "competitive area" approach in the oil industry would eliminate the preemption issue as to the California statute, and would affect the preemption issue as to the Maryland statute.

If Section 2(b) of the Robinson-Patman Act is interpreted to permit the meeting of competition on a "spot" basis, then a Supremacy Clause issue must be addressed as to which state statutes the Robinson-Patman Act preempts. This is the second issue not adequately covered by the parties which California seeks to brief. California argues that states may enact price discrimination laws more stringent than the Robinson-Patman Act if the state law furthers the fundamental, overriding aims of the federal statute. Maryland has not adequately covered this issue.

The oil companies' preemption argument is premised on their claim that Section 2(b) of the Robinson-Patman Act gives them an absolute right to meet competition. California's brief establishes that no such absolute right to meet competition is conferred by the Robinson-Patman Act, a point not adequately covered by appellees' brief.

Both parties discuss the interrelationship of Section 2(b) with the Sherman Act. (Exxon *et al.* Br. at 80-8; Appellees' Br. at 58-64.) Maryland raises the problem that price verification prompted or required by Section 2(b) of the

Robinson-Patman Act exposes sellers to price fixing liability under Section 1 of the Sherman Act. The California "competitive area" approach avoids this thorny problem.

CONCLUSION

The State of California seeks leave to file a tardy *amicus curiae* brief: (1) to protect its own interests in a similar case concerning the validity of a California statute prohibiting price discrimination in the oil industry, the submission of the appeal of which case has been recently vacated by the Ninth Circuit pending decision in this case; (2) to influence any guidelines this Court may establish for deciding whether state statutes are preempted by the Robinson-Patman Act; (3) to insure that this Court not inadvertently rule (possibly incorrectly) on California's case; (4) to argue questions of law not adequately covered by the parties; and (5) to insure that the Court not be misled by the parties' presentation of an "all or nothing" approach to meeting competition under the Robinson-Patman Act.

Respectfully submitted,

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Brief of the State of California as Amicus Curiae

INTEREST OF AMICUS CURIAE

The State of California respectfully submits this brief *amicus curiae* pursuant to Supreme Court Rule 42(3).

The State of California, like the State of Maryland, recently enacted a statute concerning price discrimination

in the sale of motor vehicle fuels and oils. (California Bus. & Prof. Code §§ 21200-21203, which is reproduced in Appendix A hereto.) The California statute prohibits price discrimination in the sale of motor vehicle fuels and oils in language virtually identical to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). (Cal. Bus. & Prof. Code § 21200.) Unlike the Maryland statute, the California statute contains a "meeting competition" defense, under which an oil company may discriminate in price if the lower price was made in good faith to meet an equally low price of a competitor ". . . and was also offered to any other of his purchasers in competition with" the favored purchaser. (Cal. Bus. & Prof. Code § 21200.) Thus, the California statute allows the meeting of competition on a "competitive area" basis instead of on a state-wide basis as required by the Maryland statute.

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U.S.L.W. 3184 (October 3, 1977)." A copy of this order, filed December 27, 1977, is attached as Appendix C hereto.

California files this *amicus curiae* brief because the decision in the instant matter will substantially affect the disposition of a related case concerning the constitutionality of a California statute on one of the same subjects as the Maryland statute. (The California statute, unlike the Maryland statute, covers only price discrimination, and does not, for example, prohibit company-operated stations.) This *amicus curiae* brief is limited to the Supremacy Clause issues arising from state price discrimination statutes.

QUESTIONS PRESENTED

1. Whether Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), should be construed as requiring the meeting of competition in the oil industry on a "competitive area" basis rather than on a "spot" basis in order to further the basic purpose of the Act, to prevent the anticompetitive consequences of the meeting of competition on a "spot" basis, and to further Congressional intent not to allow the meeting of competition in an unnecessarily discriminatory manner.

2. Whether competition in the oil industry is promoted by the meeting of competition on a "competitive area" basis or a "spot" basis.

3. Whether (even if Section 2(b) of the Robinson-Patman Act is not construed as requiring the meeting of competition in the oil industry on a competitive area basis), the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevents the oil companies from meeting competition on a "spot" basis.

4. Whether, assuming *arguendo* the Robinson-Patman Act is construed to permit the meeting of competition on a

"spot" basis, a state may enact a price discrimination law containing a more stringent meeting competition defense than contained in the Robinson-Patman Act as long as the state law furthers the fundamental, overriding purpose of the federal statute.

5. Whether Section 2(b) of the Robinson-Patman Act confers an absolute right to meet competition on a "spot" basis.

SUMMARY OF ARGUMENT

The meeting competition defense of the Robinson-Patman Act should be construed to require the meeting of competition in the oil industry on a "competitive area" basis, not on the "spot" basis urged by the oil companies. The meeting competition defense is an exception to the fundamental, overriding purpose of the Robinson-Patman Act, *i.e.*, to prohibit price discrimination between competing customers of the same supplier. As an exception to the Act's basic purpose, the meeting competition defense should be strictly construed to further the basic purpose of the Act. In advocating a liberal construction of the meeting competition defense, the oil companies seek to use the defense as a "sword" to create the very injurious discriminations the Act prohibits.

The "competitive area" approach is in accordance with Congressional intent not to allow the meeting of competition in an *unnecessarily discriminatory* manner. *See* 80 Cong. Rec. 9418 (1936), quoted by this Court as dispositive of legislative intent in enacting Section 2(b) in *FTC v. Staley Mfg. Co.*, 324 U.S. 746 (1945), at 754, footnote 2. The "competitive area" interpretation also avoids the anti-competitive consequences of the meeting of competition on a "spot" basis, as recognized in *FTC v. Sun Oil Co.*, 371 U.S. 503, 519, 523, 526-7 (1963).

Competition in the oil industry is fostered by the meeting of competition on a competitive area basis. The meeting of competition on a "spot" basis suppresses competition in the oil industry. Since the underlying goal of the antitrust laws is to foster competition, the "spot" pricing interpretation of Section 2(b) should be rejected and the "competitive area" approach adopted for the oil industry.

Assuming *arguendo* the "competitive area" interpretation advocated by California is not adopted, the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevent the oil companies from meeting competition on a "spot" basis. An oil company wishing to match a competitor's lower price offer to one dealer on a "spot" basis cannot do so since the competitor's lower price offer on a "spot" basis is illegal. If the competitor offered the same lower price to all dealers substantially in competition with each other (*i.e.*, on a "competitive area" basis), then the competitor's lower price offer is legal and may be met in good faith on a "competitive area" basis by offering a lower price to all dealers substantially competing with the favored dealers. If the oil company singles out just one of the several dealers in that competitive area and offers a lower price to the dealer singled out, the oil company would not be meeting competition in a "good faith" manner as required by the Robinson-Patman Act.

Thus the oil companies' interpretation of Section 2(b) of the Robinson-Patman Act as permitting the meeting of competition in the oil industry on a "spot" basis must be rejected. Even if Section 2(b) of the Robinson-Patman Act is construed as permitting the meeting of competition on a "spot" basis, a state may still enact a price discrim-

ination law more stringent than, or closing a loophole to, the Robinson-Patman Act if in so doing, the state statute furthers the basic purposes of the Robinson-Patman Act. The basic purposes of the Robinson-Patman Act are frustrated by the meeting of competition in the oil industry on a "spot" basis.

Finally, the oil companies' claim that Section 2(b) confers an absolute right to meet competition on a "spot" basis is soundly refuted by the limited nature of the defense.

ARGUMENT

Introduction

California wishes to present for this Court's consideration a point of view not presented by the parties (but incorporated into the California statute): the meeting of competition on a "competitive area" basis. The "competitive area" approach—an approach in between the oil companies' "spot pricing" approach and Maryland's state-wide pricing approach—insures the supplier substantial price flexibility by allowing the oil companies to meet local competition on a "competitive area" basis without injurious and unfair price discrimination between competing dealers. In so doing, the California "competitive area" approach preserves the benefits of competition which the parties each contend the opponent's approach destroys.

I. The Robinson-Patman Act Should be Construed as Requiring the Meeting of Competition in the Oil Industry on a "Competitive Area" Basis

The Robinson-Patman Act, like the California and Maryland statutes, was enacted to outlaw price discrimination. *FTC v. Sun Oil Co.*, 371 U.S. 505, 519-520 (1963). Thus, the federal and state statutes have identical purposes and objectives:

> "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source. The House Committee declared its 'guiding ideal' in proposing the amendments to be 'the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production . . .' H.R. Rep. No. 2287, 74th Cong., 2d Sess. 6. In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." 371 U.S. at 520.

The section of the Robinson-Patman Act embodying the essence of the statute, the proscription of price discrimination, is Section 2(a).[1] 15 U.S.C. § 13(a). This Section essentially prohibits an oil company from discriminating in price between two of its purchasers where the discrimination adversely affects competition.

Section 2(b) of the Robinson-Patman Act[2] provides that the seller may defend against a Section 2(a) violation by

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1. This Section is virtually identical to the first paragraph of the California statute. (Cal. Bus. & Prof. Code § 21200, first paragraph.)

2. Section 2(b) of the Robinson-Patman Act provides:
> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C. § 13(b).

showing that the lower price was offered *in good faith* to meet the competition. The exact meaning of this section is, characteristically, unclear.[3]

California contends that in light of the purpose of the federal Act, the Robinson-Patman Act should be interpreted as requiring the meeting of competition in the oil industry on a "competitive area" basis.[4] This would further the

3. Mr. Justice Frankfurter's candid appraisal that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act," *Automatic Canteen Company v. FTC*, 346 U.S. 61, 65 (1953), is echoed by all who deal with the statute. "The Robinson-Patman Act has been called, among other things, 'one of the most tortuous legislative pronouncements ever to go on the statute books.' [Dirlam and Kahn, Fair Competition, The Law and Economics of Anti-Trust Policy 119 (1954).] It has been dubbed 'complex and anomalous' [Markham, Report of the Attorney-General's Committee on Anti-Trust Laws, 70 Q.J. Econ. 211], 'prolix and perplexing' [Report of the Attorney General's Committee to Study Anti-Trust Laws, 172 (1955)], and 'obscure' [*id.* at 175]. I am sure it has been called other things which have not been recorded and which could not be repeated here." Boles, *Marketing and the Robinson-Patman Act*, Southwestern Legal Foundation 1958 Institute on Anti-Trust Laws, 1, quoted in *Sun Oil Co. v. FTC*, 294 F.2d 465, 476 fn. 28 (5th Cir. 1961), *rev'd on other grounds, FTC v. Sun Oil Co., supra.*

4. The California statute specifically requires that the lower prices offered to one of an oil company's purchasers in order to meet competition must also be offered to other purchasers of that oil company who are in competition with the favored purchaser. Thus the California statute requires the meeting of competition on a "competitive area" (or "trade area") basis.

Section 21200 of the California statute provides in pertinent part:

> "... Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor *and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price* . . . ." Cal. Bus. & Prof. Code § 21200 (emphasis added).

fundamental, overriding purpose of the Robinson-Patman Act, namely, the prohibition of price discrimination. *See* page 7, *supra.*

The oil company appellants, on the other hand, seek an interpretation of the Robinson-Patman Act which would permit each to offer one of its purchasers a lower price—on a "spot" basis—to meet competition without offering the same lower price to its other purchasers in competition with the favored purchaser. Thus the oil companies seek to use Section 2(b) as a "sword" to create the very injurious price discrimination sought to be eliminated by Section 2(a) of the Robinson-Patman Act.

The meeting competition defense is an exception to the fundamental, overriding purpose of the Robinson-Patman Act, *i.e.*, to prohibit price discrimination between competing customers of the same supplier. As an exception to the Act's basic purpose, the meeting competition defense should be strictly construed to further the basic purpose of the Act.

The legislative history of Section 2(b) clearly demonstrates that Congress did not intend to allow a seller to meet competition in an *unnecessarily discriminatory* fashion. The Chairman of the House Conferees, in presenting the Conference Report, emphasized that Section 2(b)

> "cannot be construed as a carte blanche exemption to violate the bill as long as a competitor can be shown to have violated it first, *nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.*" 80 Cong. Rec. 9418 (1936) (emphasis added).

See also FTC v. Staley Mfg. Co., 324 U.S. 746 (1945) at 754, footnote 2, where this Court cites the above-quoted material as dispositive of Congressional intent in enacting Section 2(b).

Thus, in enacting Section 2(b) Congress did not authorize the use of *unnecessarily discriminatory* methods of meeting competition. The meeting of competition on a "spot" basis is unnecessarily discriminatory. It unnecessarily allows an oil company to protect "discriminatorily, sales to one customer at the expense of other customers" who compete with the favored customer. *FTC v. Sun Oil Co., supra*, 371 U.S. at 523. Such discrimination is unnecessary in the oil industry because an oil company can meet competition by extending the same lower price to those dealers in a small "competitive area" or "trade area."

This Court correctly recognized that the meeting of competition on a "spot" basis in the oligopolistic oil industry is unnecessarily discriminatory. *FTC v. Sun Oil Co., supra*, 371 U.S. at 519, 526-7. Instead, this Court suggested that competition be met on a "competitive area" basis, or that "other opportunities" such as advertising, merchandising or leasing policies be pursued. *Ibid.*

Not only is the meeting of competition in the oil industry on a "spot" basis unnecessarily discriminatory, it also is *anticompetitive*. This Court recognized the anticompetitive consequences in *FTC v. Sun Oil Co., supra:*

> "It is argued, however, that to deny Sun the right to reduce its prices [on a "spot" basis] as it did here is to impair price flexibility and promote price rigidity, the very antithesis of competition. We think that the contrary is the case. While allowance of the discriminatory price cut here may produce localized and temporary flexibility, it inevitably encourages maintenance of the long-range and generalized price rigidity which the discrimination in fact protects. *So long as the wholesaler can meet challenges to his pricing structure by wholly local and individualized responses, it has no incentive to alter its overall pricing policy.* Moreover, as indicated, the large supplier's ability to "spot price" will discourage the enterprising and resourceful retailer from seeking to initiate price reductions on his own. *Such reasoning may be particularly applicable in the oligopolistic environment of the oil industry.* 371 U.S. at 523 (emphasis supplied; citations omitted).

Hence, the meeting of competition on a "spot" basis, advocated by the oil company appellants, is anticompetitive in the context of the oil industry.[5] Meeting competition on a "competitive area" basis, as required by the California statute, promotes true price competition. *See also* pages 12-16, below.

Thus, the legislative history of Section 2(b) as well as an analysis of the effect on competition and a consideration of principles of statutory construction clearly demonstrate that the Robinson-Patman Act should be interpreted as requiring the meeting of competition on a "competitive area" basis, certainly at least in the oligopolistic oil industry.[6]

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5. The oil industry remains oligopolistic, each regional market being controlled by a few major sellers. *See Competition In The Energy Industry: Hearings, Pursuant to S.Res. 56, Sec. 4, before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 93rd Cong., 1st Sess. 2 (1973) (statement of Senator Philip S. Hart). *See also Report to the Federal Trade Commission on the Structure, Conduct, and Performance of the Western States Petroleum Industry,* FTC Bureau of Competition and Economics (Sept. 1975) at pages 14-16. For example, in 1972, nine (9) major oil companies controlled about 94% of the total refinery capacity in California. *See Economic and Statistical Report on the California Petroleum Industry,* prepared by the Antitrust Unit of the California Attorney General's Office (Oct. 17, 1974) at page 109.

6. Present case law recognizes that the meeting of competition on a competitive area basis complies with Section 2(b). *See Balian Ice Cream Co. v. Arden Farms,* 231 F.2d 356 (9th Cir. 1955), *cert. den.* 350 U.S. 991 (1956); *see also FTC v. Sun Oil Co., supra,* 371 U.S. at 526-7.

The oil companies (mis)cite several cases to support their contention that Section 2(b) requires the meeting of competition on

II. Competition in the Oil Industry is Promoted by the Meeting of Competition on a Competitive Area Basis and is Impaired by the Meeting of Competition on a "Spot" Basis

The meeting of competition in the oil industry on a competitive area basis, as compelled by the California statute, promotes competition. The oil company appellants erroneously assert that price competition is fostered when an oil company meets competition on a "spot" basis by offering one of its dealers a lower price to meet a competitor's offer without offering a lower price to competing dealers. (Appellants' Brief of Exxon Corp., Phillips Petroleum Co., Shell Oil Co. and Gulf Oil Co. [hereinafter Exxon *et al.* Br.] at 56, 71, 80-94.)

The meeting of primary line competition on a "spot" basis merely allows the oil company to hold onto that customer. The customer itself would have obtained the benefit of the lower price from the competitor. If the oil company were not able to meet competition on a "spot" basis and the oil company's competitor won the dealer's business, the competitor's sales would increase, just as true

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an "individual" or "spot" basis, not on a competitive area basis. *See* Exxon *et al.* Br. at 59, fn. 27, 73. ***FTC v. Staley Co., supra,*** holds that Section 2(b) does not allow a seller to adopt an illegal pricing system (based on phantom freight charges) in response to a competitor's use of a similar illegal pricing system (also based on phantom freight charges). *Accord*: ***FTC v. National Lead,*** 352 U.S. 419 (1957); ***FTC v. Cement Institute,*** 333 U.S. 683 (1948). ***Continental Baking Co. v. Old Homestead Baking Co.,*** 476 F.2d 97, 108 (10th Cir. 1973), ***cert. den.*** 414 U.S. 975 (1973), affirmed a denial of the Section 2(b) defense where the evidence established that defendant's lower price "had nothing whatsoever to do with any competitive move in the market." ***Tri-Valley Packing Ass'n. v. FTC,*** 329 F.2d 694, 705-6 (9th Cir. 1964), remands a price discrimination case for additional evidence as to whether the California Street market quotations corresponded to actual sales prices.

Furthermore, in industries (other than the oil industry) in which customers from the same supplier compete with one another beyond a small "competitive area" or "trade area", the meeting of competition on a "spot" basis might be proper. *Cf.* pages 13-14, *infra.*

competition requires, since the competitor's lower price presumably reflects that competitor's superior efficiency.[7]

If the oil company meets the competitor's lower price to the one station alone, without extending a price break to competing stations in the same competitive area, the oil company is meeting competition in an unncessarily discriminatory and unfair manner. Congress did not sanction the meeting of competition in an unnecessarily discriminatory fashion. *See* page 9, *supra.* An oil company's meeting of primary-line or secondary-line competition on a "spot" basis is unfair to the competing purchasers from the same oil company as they in effect subsidize the price cut to the favored dealer in paying a higher price to the oil company while suffering either a lower profit margin or lower sales.

In an oligopolistic industry like the oil industry, the first price break, if allowed to be met on a "spot" basis, is contained without spreading and triggering a new pricing structure. (In contrast, in a more perfectly competitive industry, where the seller's control over the market is small or nil, the first price break, even if met on a "spot" basis, cannot be contained because control of the market is so

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7. The meeting of secondary-line competition in the oil industry on a "spot" basis poses a serious conflict with the Sherman Act, as noted by the State of Maryland. (Appellees' Br. at 58-64.) Price verification not only risks violating the Sherman Act, it also risks the anticompetitive effects of price fixing or price stabilization. The best solution to this conflict is to allow the meeting of secondary-line competition on a competitive area basis, thereby eliminating the need or occasion for price communication between competitors.

The meeting of secondary line competition in the oil industry on a "spot" basis does not materially lower gasoline prices, for the price-conscious consumer would purchase at the lower price from the station allegedly receiving price support from the competing supplier. The lower price will be contained, and will not spread. *See* pages 13-14, *infra.* The "harm" suffered by the dealer sought to be aided on a "spot" basis is the proper result of interbrand competition.

fragmented and dispersed. Therefore, in a more perfectly competitive industry, unlike the oil industry, the first price break spreads and triggers a price restructuring.) This Court recognized the anticompetitive effect of meeting competition on a "spot" basis in the oligopolistic oil industry in *FTC v. Sun Oil Co., supra,* 371 U.S. at 523.

The meeting of competition in the oil industry on a competitive area basis, as compelled by the California statute, promotes true price competition in preventing an oil company from protecting (unnecessarily and) "discriminatorily, sales to one customer at the expense of other customers." *FTC v. Sun Oil Co., supra,* 371 U.S. at 523. In preventing the oil company from meeting challenges to its pricing structure by "wholly local and individualized responses", it gives the oil company the "incentive to alter its overall pricing policy." *Ibid.*

Thus, competition in the oil industry is promoted by meeting competition on a competitive area basis (as compelled by the California statute), not by the "spot" approach advocated by the oil companies.

In attempting to demonstrate the procompetitive effect of meeting competition on a "spot" basis, the oil companies rely on *Standard Oil Co. v. FTC,* 340 U.S. 231 (1951), and some excerpts from the legislative history of the Robinson-Patman Act indicating that Congress did not intend to require a seller to cut prices "over a wide area", "all over the country", or to "all" customers in order to meet competition. (Exxon *et al.* Br. at 81, 86-87, 90.) These bits of legislative history indicate neither Congressional approval of the oil companies' "spot" approach nor Congressional rejection of the competitive area approach. Since the meeting of competition on a competitive area basis hardly

involves the reduction of prices "all over the country" or "over a wide area" or to "all" customers, these bits of legislative history do not show Congressional approval of the "spot" approach over the competitive area approach.[8]

The oil companies' heavy reliance on the Supreme Court decision in *Standard Oil Co., supra,* is misplaced as the decision is factually inapposite to the instant case. The facts of *Standard Oil Co.* are based upon extensive price wars occurring in the economic turbulence of the 1930's, a far different economic setting than today's oligopolistic oil industry wherein a few large companies in each regional market control all facets of the industry from production to transportation to distribution to retailing. *See* footnote 5, *supra.*

That the Supreme Court's decision in *Standard Oil Co.* is limited to its factual setting of the 1930's is clear from the decision itself:

> "[I]f a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, *the seller may well find it essential, as a matter of business survival,* to meet that price rather than to lose the customer. *It might be that this customer is the seller's only available market for the major portion of the seller's product,* and that the loss of this customer would result in forcing a

8. Similarly, the oil companies' contention that "a seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to *none*" (Exxon *et al.* Br. at 86) is strawman since the competitive area approach does not require the seller to reduce prices to all.

The oil companies' current practice of meeting competition on a "trade area" basis demonstrates that requiring the oil companies to meet competition on a "competitive area" basis does not prevent the oil companies from meeting competition, and does not result in the oil companies' reducing prices to none. *See, e.g., Bunty v. Shell Oil Co.,* 1972 CCH Trade Cases ¶ 74,252 (D. Nev. 1972) (Yeager Aff. II, ¶ 4). *See also* Naughton Aff. (I), ¶s 4-6, 8, 11 (A. 158-160) and Naughton Aff. (II), ¶s 21-25 (Plaintiffs' Exhibit 10C:A.671-4, 465).

much higher unit cost and higher sales price upon the seller's other customers." 340 U.S. at 249-250 (emphasis supplied).

These factual assumptions as to the seller's dependence on a particular customer[9] are inapplicable to the present oligopolistic oil industry dominated not by distributors or retailers but the oil companies themselves.[10]

Therefore, competition in the oil industry is promoted by the meeting of competition on a "competitive area" basis (as compelled by the California statute) and not by the "spot" pricing approach advanced by the oil companies.

III. Even If Section 2(b) of the Robinson-Patman Act Is Not Construed as Advocated by California, the Requirements of Section 2(b) That the Competitor's Price Be Lawful and That Competition be Met "In Good Faith" Prevents the Oil Companies From Meeting Competition on a "Spot" Basis

The meeting competition defense under the Robinson-Patman Act is not available to meet the *illegal* lower price of a competitor. *See FTC v. Staley Mfg. Co., supra,* 324 U.S. at 754; *see also Standard Oil Co. v. FTC, supra,* 340 U.S. at 246. Furthermore, competition can only be met "in good faith". 15 U.S.C. § 13(b).

The requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevent oil companies from meeting competition on a "spot" basis.

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9. Likewise, the oil companies' reliance on the language in *Standard Oil, supra,* that the Robinson-Patman Act did not intend to leave a seller with "no substantial right of self defense against a price *raid* by a competitor . . ." is misplaced. (Exxon *et al.* Br. at 87.)

10. Legally, the *Standard Oil* decision does not determine whether an oil company may meet competition in an unnecessarily discriminatory manner. The *Standard Oil* decision is not addressed to this issue (as the FTC never raised it in *Standard Oil*). Thus, *Standard Oil, supra,* is factually and legally inapposite.

For example, if a competing supplier (such as Exxon) offers a lower price to one of an oil company's (Shell's) unbranded[11] dealers without offering the same lower price to all of the competing supplier's (Exxon's) dealers in competition with the oil company's (Shell's) dealer to be favored, the competing supplier (Exxon) will be violating Section 2(a) of the Robinson-Patman Act. Hence, the competing supplier's (Exxon's) lower price offer to one of an oil company's (Shell's) unbranded dealers alone would be unlawful. Since Section 2(b) cannot be used to meet an unlawful price, the oil company (Shell) cannot meet this competition on a "spot" basis (even if otherwise allowed to meet competition on a "spot" basis).

Where the competing supplier (Exxon) offers a lower price to an oil company's (Shell's) unbranded dealer and at the same time offers that lower price to its (Exxon's) dealers in the same competitive area, the oil company (Shell) can meet the competition faced by all its dealers in that competitive area by responding on a competitive area basis under the Robinson-Patman Act (and under the California statute). Should the oil company (Shell) attempt to meet the competition on a "spot" basis (by offering the lower price only to the Shell dealer to whom Exxon offered a lower price), the oil company (Shell) would not be acting in "good faith" as required by Section 2(b), since it would be protecting, "discriminatorily, sales to one customer at the expense of other customers" similarly situated. This is exactly what this Court condemned as anticompetitive in the oligopolistic oil industry in *FTC v. Sun Oil Co., supra,* 371 U.S. at 523.

The requirements that the competitor's price be lawful and that competition be met "in good faith" likewise

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11. Branded dealers and lessee-dealers are not ordinarily free to switch suppliers.

eliminates the oil company's ability to meet secondary-line competition as well. For example, if one oil company (Exxon) offers a lower price to one of its dealers without offering the same lower price to all of its dealers in competition with the favored (Exxon) dealer, the oil company (Exxon) is violating Section 2(a) of the Robinson-Patman Act and, therefore, a competing oil company (Shell) would not be able to meet secondary-line competition caused by the first oil company's lower price to its dealer (even assuming *arguendo* the meeting of secondary-line competition is permitted in the oil industry).

Where one oil company (Exxon) offers a lower price to one of its (Exxon's) dealers and at the same time extends that lower price to its dealers in the same competitive area, a competing supplier (Shell) can meet the competition faced by all of its (Shell's) dealers in the competitive area by responding on a competitive area basis under the Robinson-Patman Act (and under the California statute). Should Shell attempt to meet competition on a "spot" basis (by offering the lower price only to one of several Shell dealers competing with the favored Exxon dealers), then Shell is not acting in "good faith" as required by Section 2(b) since it is protecting, "discriminatorily, sales to one customer at the expense of other customers" similarly situated.

Therefore, even if Section 2(b) of the Robinson-Patman Act is not construed as requiring that competition in the oil industry be met on a "competitive area" basis rather than on a "spot" basis, the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevents the oil companies from meeting competition on a "spot" basis.

IV. Even If the Robinson-Patman Act Is Interpreted to Permit the Meeting of Competition in the Oil Industry on a "Spot Basis", the Supremacy Clause Allows a State to Enact a Price Discrimination Law More Stringent Than, or Closing a Loophole to, the Robinson-Patman Act as Long as the State Law Furthers the Basic Purposes of the Robinson-Patman Act

Assuming, *arguendo,* the Robinson-Patman Act permits oil companies to meet competition on a "spot" basis, the difference between the Robinson-Patman Act and a state statute prohibiting the meeting of competition on a "spot" basis does not rise to the level of an impermissible conflict under the Supremacy Clause where the possible difference merely closes a loophole to the federal statute and thereby furthers the fundamental, overriding aim of the federal statute.

The first step is to examine whether the state statute frustrates or promotes the Congressional purpose: to foster fair price competition without the use of oppressive price discriminations. Assuming no irreconcilable conflict with Congressional purpose to foster fair price competition exists, then the possible difference in the means of meeting competition must be examined to see if the possible difference is irreconcilable.

A. The Basic Aims of the Robinson-Patman Act Are Frustrated by the Meeting of Competition in the Oil Industry on a "Spot" Basis (and Furthered by the Meeting of Competition on a Competitive Area Basis)

The fundamental, overriding aim of the Robinson-Patman Act is the prohibition of price discrimination contained in Section 2(a). In enacting the Robinson-Patman Act, Congress intended to insure "that businessmen at the same functional level would start on equal competitive footing as far as price is concerned." *FTC v. Sun Oil Co., supra,* 371 U.S. at 520. Under the "spot" pricing interpretation of the meeting competition defense, an oil company *creates* price discrimination between the favored dealer and its

other purchasers competing with that dealer. Therefore, the meeting of competition on a "spot" basis frustrates the fundamental, overriding aim of the Robinson-Patman Act to insure "that businessmen at the same functional level would start on equal competitive footing as far as price is concerned." *Ibid.*

The meeting of competition on a "spot" basis has previously been shown to be anticompetitive. See Part II, *supra*. Since the basic purpose of all antitrust laws is to promote competition (a principle recognized by the oil companies, *see* Exxon *et al.* Br. at 80), the meeting of competition on a "spot" basis advocated by the oil companies frustrates the fundamental or basic purposes of the Robinson-Patman Act.

In contrast, the meeting of competition on a competitive area basis furthers the fundamental purposes of the Robinson-Patman Act. See Parts I and II, *supra*.

B. A State May Enact a Price Discrimination Law More Stringent Than, or Closing a Loophole to, the Robinson-Patman Act, as Long as the State Law Furthers the Basic Purpose of the Robinson-Patman Act

The Supremacy Clause permits a state to enact legislation imposing stricter or higher standards than imposed by a federal statute. *See e.g., Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 144 (1963); *Colorado Comm'n v. Continental,* 372 U.S. 714 (1963); *DeVeau v. Braisted,* 363 U.S. 144, 152, 153 (1960); *Cloverleaf Co. v. Patterson,* 315 U.S. 148, 162 (1942); *Mariniello v. Shell Oil Company,* 511 F.2d 853, 857 (3rd Cir. 1975); *Associated Gen. Contractors of Mass., Inc. v. Altshuler,* 361 F.Supp. 1293, 1302-1303 (D.Mass. 1973), *aff.* 490 F.2d 9, 15 (1st Cir. 1973), *cert. den.,* 416 U.S. 957 (1974); *City of New York v. Diamond,* 379 F.Supp. 503, 520 (S.D.N.Y. 1974). *See also A. H. Robins v. California Department of Health,* 59 Cal.App.3d 903 (1976), *cert. den.* 429 U.S. 1035 (1977).

The ability to enact statutes imposing higher standards than federal statutes must permit a state to enact a statute restricting or closing a loophole to a federal statute, particularly where closing or restricting the loophole *promotes* the fundamental, overriding aim of the federal statute.

Therefore, assuming that state and federal statutes are in conflict, and considering this Court's mandate to reconcile the two statutes rather than holding the state statute completely ousted, California submits that this duty can properly be met by upholding a possibly stricter state statute as valid if its effect is to close a loophole in the federal statute and thereby foster the fundamental objective of that statute.[12] California submits that the California statute is valid for these reasons.

C. Section 2(b) of the Robinson-Patman Act Confers No Absolute Right to Meet Competition

The clearly recognized limitation on the applicability of the Section 2(b) defense refutes the oil companies' erroneous assertion that Section 2(b) of the Robinson-Patman Act confers an absolute right to meet competition. (Exxon

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12. The meeting of competition on a competitive area basis does not cause an oil company to violate or risk violating the Robinson-Patman Act. *Cf.* Exxon *et al.* Br. at 71-77. A seller may meet competition on a "competitive area" basis. *See Balian Ice Cream Co. v. Arden Farms, supra; FTC v. Sun Oil Co., supra.* No primary-line violation could possibly result from the meeting of competition on a "competitive area" basis since as a practical matter primary-line violations require proof of predatory intent to injure or destroy a competitor. *See Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 696-701 (1967); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 119, 120 (1954); *Dean Milk Co. v. FTC,* 395 F.2d 696, 707-8 (7th Cir. 1968); *Forster Mfg. Co. v. FTC,* 335 F.2d 47, 52-53 (1st Cir. 1964), *cert. den.,* 380 U.S. 906 (1965); *Anheuser-Busch v. FTC,* 289 F.2d 835, 841-844 (7th Cir. 1961). *See also* Austin T. Stickells, *Antitrust Laws* (1972), § 131 at p. 465. Proof of predatory intent to injure or destroy a competitor is, of course, inconsistent with the claim that the seller was meeting

et al. Br. at 57-8, 88-9.) This limitation also demonstrates the restricted nature of the meeting competition defense as a loophole subordinate to the fundamental, overriding aim of outlawing price discrimination between competing purchasers from the same supplier.

The meeting competition defense under the Robinson-Patman Act is not available to meet the *illegal* lower price of a competitor. *See FTC v. Staley Mfg. Co., supra,* 324 U.S. at 754; *see also Standard Oil Co. v. FTC, supra,* 340 U.S. at 246. This limitation, not contained in the language of Section 2(b), was nevertheless imposed to prevent Section 2(b) from nullifying the fundamental, overriding purpose of Section 2(a). *Ibid.*

Since an unlawful price of a competitor obviously has as much competitive consequences (if not more drastic competitive effect) on the seller as a lawful price of a competitor, Section 2(b) of the Robinson-Patman Act in no way creates any absolute "right" to meet competition.

Thus, Section 2(b) of the Robinson-Patman Act confers no absolute right to meet competition. The meeting competition defense is merely a loophole and is subordinate to the basic aim of outlawing price discrimination between competing purchasers from the same supplier.

CONCLUSION

The meeting competition defense of the Robinson-Patman Act should be construed as requiring the meeting of competition in the oil industry on a "competitive area" basis. This interpretation, which is codified in the California

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competition *in good faith*. Therefore, in meeting competition on a competitive-area basis, an oil company does not engage in a primary-line violation of the Robinson-Patman Act unless its true purpose is not to meet competition but to further a predatory intent to destroy or injure a competitor, as was the case in *Forster Mfg. Co., supra.*

statute, is in accordance with the Congressional intent not to allow the meeting of competition in an unnecessarily discriminatory manner, and promotes competition in the oil industry. The meeting of competition on a "spot" basis advocated by the oil companies impairs competition in the oil industry and therefore is contrary to the basic purpose of the antitrust laws. In urging that competition be met on a "spot" basis, the oil companies seek to use the defense as a sword to create the very injurious discrimination the Act prohibits. Since the meeting competition defense is an exception to the fundamental, overriding purpose of the Robinson-Patman Act (*i.e.*, the prohibition of price discrimination between competing customers of the same supplier), it should be strictly construed.

Even if the "competitive area" interpretation advocated by California is not adopted, the requirements of Section 2(b) that the competitor's price be lawful and that competition be met "in good faith" prevent the oil companies from meeting competition on a "spot" basis. An oil company cannot match a competitor's lower price offer to one dealer on a "spot" basis because the competitor's lower price offer to one dealer on a "spot" basis is illegal. If the competitor offers the same lower price to all dealers substantially in competition with each other (*i.e.*, on a "competitive area" basis), then the competitor's lower price offer is legal and may be met in good faith on a "competitive area" basis by offering a lower price to all dealers substantially competing with the favored dealers. If the oil company responds to the competitor's lower price offers by singling out just one of the several dealers in that competitive area and offering a lower price just to the one dealer singled out, the oil company would not be meeting competition in "good faith."

For all these reasons the oil companies' interpretation of Section 2(b) of the Robinson-Patman Act as permitting

the meeting of competition in the oil industry on a "spot" basis must be rejected. Even if Section 2(b) is construed as permitting the meeting of competition on a "spot" basis, a state may still enact a price discrimination law more stringent than, or closing a loophole to, the Robinson-Patman Act if in so doing, the state statute furthers the basic purposes of the Robinson-Patman Act. The basic purposes of the Robinson-Patman Act, the prohibition of price discrimination between competing customers of the same supplier and the fostering of competition, are frustrated by the meeting of competition in the oil industry on a "spot" basis. Hence, state laws requiring that competition in the oil industry be met on a basis other than a "spot" basis may be valid. Finally, the oil companies' claim that they have an absolute right to meet competition on a "spot" basis is soundly refuted by the limited nature of the defense. Therefore, state price discrimination statutes need not allow the meeting of competition on a "spot" basis in the oil industry.

Respectfully submitted,

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Appendix A

TEXT OF THE CALIFORNIA STATUTE

California Business and Professions Code sections 21200-21203 provide:

§ 21200. Motor vehicle fuels or oils; discrimination in price

It is unlawful for any refiner, distributor, manufacturer, or transporter of motor vehicle fuels or oils engaged in business in this state, either directly or indirectly, to discriminate in price between different purchasers of motor vehicle fuels or oils of like grade and quality, where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price. If such lower price should be incorporated into a term contract, no such contract shall as to such discriminatory price be valid for more than one year.

Nothing in this section shall prevent differentials which make only due allowance for differences in the cost of manufacture, marketing, transportation, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

Nothing in this section shall prevent persons engaged in selling motor vehicle fuels or oils in this state from selecting their own customers in bona fide transactions and not in restraint of trade.

Nothing in this section shall prevent price changes from time to time where in response to changing conditions affecting the market for, or the marketability of, the products concerned, such as, but not limited to, actual or imminent deterioration of products, distress sales under court process, or sales in good faith in discontinuance of business in the products concerned.

Nothing in this section shall apply to the purchase of motor vehicle fuels or oils for their own use by state and local agencies or public utilities.

§ 21201. Application of chapter

The provisions of this chapter shall only apply to refiners, distributors, manufacturers, or transporters of petroleum products engaged in business in this state whose total production, gasoline refining capacity or sales volume at the wholesale level is 50,000 barrels a day or more.

§ 21202. Action for damages; judgment

Any person injured by any violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney's fees.

§ 21203. Legislative findings and declaration

The Legislature finds and declares that distribution and sales of motor vehicle fuels and oils in the State of California affect the general economy of the state, the public interest and the public welfare. Competition and freedom from unreasonable discriminatory practices are essential to the fair and efficient functioning of a free market

economy. Competitive conditions are rapidly changing with resulting market dislocation. Therefore, it is further provided that any existing contracts, arrangements, or agreements with provision for prices not in compliance with this chapter shall be void on and after the effective date of this chapter as to such provisions, except for any as may be required to be extended beyond said date to comply with any applicable federal price control laws, regulations or orders.

Appendix B

ORIGINAL
FILED
JUN 11 1976
CLERK, U.S. DIST. COURT
SAN FRANCISCO

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHELL OIL COMPANY, *Plaintiff,* vs. EVELLE J. YOUNGER, Attorney General of the State of California, *Defendant.*	C-75 2691 LHB ORDER

This cause came on to be heard by this Court upon:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Because of a Lack of a Justiciable Controversy and the Non-Joinder of Interested Parties, and Motion to Dismiss or in the Alternative Stay This Action on Abstention Grounds;

2. Defendant's Notice of Three-Judge District Court Requirement; and

3. Plaintiff Shell Oil Company's Motion for Summary Judgment.

Having considered the affidavits and memoranda of points and authorities submitted in support of and in opposition to these three motions, having considered the pleadings and other papers on file, having heard the oral argument of counsel, and being fully advised herein, the Court hereby finds and decrees that:

1. Defendant's motion to dismiss, or to stay, is denied in all respects. This action presents a justiciable controversy. None of the other grounds urged by defendant in support of the motion to dismiss or to stay is valid.

2. This Court possesses the jurisdiction to deny defendant's motion to dismiss, or stay, and to decide Shell's motion for summary judgment, and the convening of a three-judge court is not required. The Court declares, and the parties have agreed in open court, that Section 2281 of the Judicial Code, 28 U.S.C. § 2281, is inapplicable to the resolution of constitutional questions arising solely under the Supremacy Clause of the United States Constitution and Shell's motion for summary judgment arises solely under the Supremacy Clause.

3. Chapter 8, Division 8 of the California Business and Professions Code (California Assembly Bill No. 950, enacted by the California Legislature in its 1975 session, signed into law on September 22, 1975 and effective January 1, 1976) is in irreconcilable conflict with the Federal Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), et seq. and under the Supremacy Clause of the United States Constitution must be, and hereby is, declared to be unconstitutional, illegal, invalid and of no force and effect. Chapter 8 of Division 8 frustrates the Congressional purpose embodied in Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), to foster and encourage price competition. Moreover, the California statute is in direct, actual conflict with the Federal Act.

There is no genuine issue of material fact relative to Shell's motion for summary judgment and plaintiff Shell is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Because of a Lack of Justiciable Con-

troversy and the Non-Joinder of Interested Parties, and Motion to Dismiss or in the Alternative Stay This Action on Abstention Grounds is denied in all respects.

2. This Court possesses the jurisdiction to deny defendant's motion to dismiss, or to stay, and to decide Shell's summary judgment motion. The convening of a three-judge court is not necessary. Section 2281 of the Judicial Code, 28 U.S.C. § 2281, is inapplicable since Shell's motion for summary judgment involves solely a claim of unconstitutionality under the Supremacy Clause of the United States Constitution.

3. Plaintiff Shell Oil Company's Motion for Summary Judgment is hereby granted on the grounds that Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950) is in direct, actual irreconcilable conflict with the Federal Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), et seq.

4. Plaintiff's motion in open Court to dismiss the second count of its Complaint (¶¶ 14-17), without prejudice, is hereby granted.

5. Judgment be and the same hereby is entered in favor of plaintiff Shell Oil Company and against the defendant Evelle J. Younger, Attorney General of the State of California, and Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950) is hereby declared and decreed to be unconstitutional, illegal, invalid and of no force and effect.

6. Evelle J. Younger, Attorney General of the State of California, and each of his successors, is hereby prohibited and enjoined from enforcing in any way against plaintiff Shell Oil Company the provisions of Chapter 8, Division 8

of the California Business and Professions Code (Assembly Bill 950).

7. Costs to be taxed by the Clerk in favor of plaintiff and against defendant.

Dated: June 11, 1976.

Lloyd H. Burke
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
Dec. 27 1977
EMIL E. MELFI, JR., Clerk
U.S. Court of Appeals

SHELL OIL COMPANY,
Plaintiff-Appellee,
v.
EVELLE J. YOUNGER, Attorney General of the State of California,
Defendant-Appellant.

No. 76-2784
ORDER

Before: BROWNING, *TUTTLE, and ANDERSON, Circuit Judges

Submission of the appeal is vacated pending a decision by the Supreme Court of the United States in *Exxon Corp. v. Maryland, review granted* 46 U.S.L.W. 3184 (October 3, 1977).

*Honorable Elbert Parr Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.